8. DISCLAIMER OF INTEREST AND WITHDRAWAL OF PETITION

A determination of the question concerning representation raised in the filing of a petition may be foreclosed by a disclaimer of interest by the party whose representative status is in issue or by the withdrawal of petition.

8-100 Disclaimer

332-2500 et seq.

A valid disclaimer may be made by the petitioning representative, by the representative named in an employer petition, or by the incumbent union sought to be decertified. To be effective, it must be clear and unequivocal and made in good faith. *Retail Associates,* 120 NLRB 388, 391–392 (1958); *Rochelle's Restaurant*, 152 NLRB 1401 (1965); *Gazette Printing Co*., 175 NLRB 1103 (1969). In *International Paper*, 325 NLRB 689 (1998), the Board characterized the request as being one of "sincere of abandonment with relative permanency."

Thus, a union's bare statement is not sufficient to establish that it has abandoned its claim to representation if the surrounding circumstances justify an inference to the contrary. *3 Beall Bros. 3*, 110 NLRB 685, 687 (1955). Its conduct, judged in its entirety, must not be inconsistent with its alleged disclaimer *H. A. Rider & Sons*, 117 NLRB 517, 518 (1957). *McClintock Market*, 244 NLRB 555 (1979), and *Ogden Enterprises*, 248 NLRB 290 (1980). *Windee's Metal Industries*, 309 NLRB 1074 (1992).

In any inquiry into the effectiveness of a disclaimer, the union's contemporaneous and subsequent conduct receives particular attention. *Miratti's, Inc.,* 132 NLRB 699 (1961); *Holiday Inn of Providence-Downtown*, 179 NLRB 337 (1969); *Denny's Restaurant*, 186 NLRB 48 (1970). In the latter, the Board rejected a contention that the withdrawal or dismissal by the General Counsel of charges filed by the employer, alleging violations of Section 8(b)(7)(c) based on the picketing involved in the case, precluded a finding of conduct inconsistent with the union's asserted disclaimer. See also *Electrical Workers IBEW Local 58 (Steinmetz Electrical),* 234 NLRB 633 (1978), an unfair labor practice case. In *VFL Technology Corp*., 329 NLRB 458 (1999), a union's disclaimer issued pursuant to an Article XX (no raid) decision was considered ineffective where the union continued to represent the employees.

The determination whether a disclaimer of interest by a union should be accepted at face value or whether, despite the disclaimer, the union is actually continuing to have an immediate recognitional object comes up with recurring regularity. The question in such cases, the Board has held, is one of fact to be resolved by evaluating the union's course of conduct before and after the disclaimer. See, for example, *Pennisula General Tire Co.,* 144 NLRB 1459 (1963). *McClintock Market* and *Ogden Enterprises*, supra.

In *American Sunroof Corp*., 243 NLRB 1128 (1979), the Board held that a disclaimer by a contracting union would remove that contract as a bar to an election. Compare *Mack Trucks*, 209 NLRB 1003 (1974); *Gate City Optical Co*., 175 NLRB 1059 (1969); *East Mfg. Corp.,* 242 NLRB 5 (1979). For further discussion of this issue see chapter 9, infra. See also *VFL Technology Corp*., 332 NLRB No. 159 (2000) in which a divided Board found a clear and unequivocal disclaimer of interest by the union after it had lost a "no raid" proceeding under Article XX of the AFL–CIO constitution.

The absence of a disclaimer may be considered in assessing whether this is a recognitional objective. *Micromedia Publishing*, 289 NLRB 537 (1988).

An issue arose in the context of a claim by a union that, while it was possibly retaining its interest in representing the employees at some *future* date, it was no longer making a *present* demand for recognition. In rejecting this contention, the Board found it significant that the union was not picketing for reinstatement of one or a small number of employees, but for a mass reinstatement of all strikers. "Since the strikers," observed the Board, "were union adherents, the immediate consequence of mass reinstatement would have been the reestablishment of the union's earlier majority status." In these circumstances, it could not be realistically said that it had only a future, but not a present, object of recognition. Also taken into

consideration was the union's continued picketing in support of bargaining demands for a 16-month period. *Gazette Printing Co*., supra.

In this connection, the Board has stated that, if there is recognitional picketing immediately prior to an alleged shift in purpose, it will review the alleged shift in purpose with "some skepticism." *Waiters & Bartenders Local 500 (Mission Valley)*, 140 NLRB 433, 442 (1963). This is particularly true when the union resumes picketing after "a very brief hiatus" (*Gazette Printing Co*., supra). The holding that the picketing in *Gazette* had a recognitional objective, however, was explicitly based on the particular facts of that case, and in no way modified the position, set forth in *Auto Workers (Fanelli Ford),* 133 NLRB 1468 (1961), that picketing for reinstatement does not necessarily have a recognitional object. (*Gazette Printing Co*., supra at fn. 5.) See also *Don Davis Pontiac*, 233 NLRB 853 (1977). For further discussion of hiatus, see *Philadelphia Building Trades Council (Altemose Construction)*, 222 NLRB 1276 (1970), and *Electrical Workers IBEW Local 453 (Southern Sun*), 242 NLRB 1130 (1979).

The decision in *Gazette* is consistent with *Mission Valley*, supra. In *Mission Valley*, the Board found that the union abandoned its recognitional purpose in August 1959. The picketing alleged to be illegal occurred more than 6 months later. In *Gazette*, there was admittedly recognitional activity several days before the alleged nonrecognitional activity. Because there was no recognitional activity for 6 months prior to the alleged recognitional picketing in *Mission Valley,* such a finding would have been unreasonable in that case. Moreover, in *Mission Valley*, the union was seeking reinstatement for 22 strikers in a unit of 70, and their reinstatement would therefore not have resulted in immediate attainment of majority status.

When, however, the union's picketing is not inconsistent with its disclaimer, an employer's petition is subject to dismissal. *Autohaus-Bugger Inc.,* 173 NLRB 184 (1969). For example, picketing at customer entrances, having as its purpose and effect the notification to the public of the fact that the employer is "not union," is not in and of itself inconsistent with the union's disclaimer. *Cockatoo, Inc.,* 145 NLRB 611, 614 (1964); see also *Raymond F. Schweitzer, Inc.,* 165 NLRB 875 (1974). Cf. *Rusty Scupper*, 215 NLRB 201 (1974).

The pressing of an appeal from a Regional Director's dismissal of a charge alleging violation of Section 8(a)(1) and (5) is not necessarily inconsistent with a union's disclaimer of a present status as majority representative of the employees. *Franz Food Products,* 137 NLRB 340 (1962). Section 9(c)(ii) authorizes the Board to proceed to an election only when there is a *present* claim of representation by the union, while an 8(a)(5) allegation is based on the contention that the union represented a majority *in the past*; i.e., at the time it requested recognition and the employer unlawfully refused to bargain with it. The finding of an 8(a)(5) violation thus necessarily requires an implicit conclusion that no valid question of representation existed at the time of the Board's order. When the union's disclaimer is found to be effective, of course, no election will be held.

On the other hand, 2 days before a disclaimer, the union told the employer that its picketing was designed as a pressure device to force capitulation to its recognition demand made 3 months earlier and, notwithstanding its disclaimer, continued without interruption to picket as it had done before, save for a slight modification in the picket sign language. The union's "entire course of conduct" was inconsistent with its expressed disclaimer. *Capitol Market No. 1*, 145 NLRB 1430, 1432 (1964), *McClintock Market*, supra. Likewise, when the picketing was begun at the instigation of an association which included a number of the employer's competitors and which had asked the union if it could "do anything" about the employer's alleged substandard wages and hours, and when the union alleged that its picketing was assertedly to protest substandard wages and working conditions, but at no time had inquired into these subjects, the picketing was inconsistent with the disclaimer and was designed to force the employer to recognize and bargain with the union. *Pennisula General Tire Co*., supra.

Publicity picketing, or picketing aimed only at organizing the employees with the hope of eventually succeeding and then obtaining recognition, is not necessarily inconsistent with a disclaimer of a *present* claim for recognition. *Martino's, Home Furnishings*, 145 NLRB 604 (1964). In that case, as of the date of the hearing, almost 2 years after the union had last communicated with the employer, it directed its appeal to the public toward persuading potential consumers not to shop at the employer's establishment and distributed leaflets expressly declaring, "We make no demands of any kind" on the employer. This did not

constitute a present claim to recognition and the union's activity was consequently not inconsistent with its disclaimer. See also *Windee's Metal Industries*, 309 NLRB 1074 (1992).

A union's failure to act in furtherance of its recognition, including failure to appear at the representation hearing, has been interpreted by the Board as either an abandonment of its representative status or a disclaimer that it represents the employees in question. *Josephine Furniture Co*., 172 NLRB 404 (1968), *Texas Bus Lines*, 277 NLRB 626 (1985). Cf., *McClintock Market*, supra at fn. 4; *Brazeway*, *Inc.,* 119 NLRB 87, 88 fn. 3 (1958); *O'Connor Motors*, 100 NLRB 1146 fn. 1 (1951); *Felton Oil Co*., 78 NLRB 1033, 1034 (1948).

8-200 Withdrawal

332-5000 et seq.

Related to the subject of disclaimer of interest is the prior withdrawal of a petition.

Prior to the transfer of a case to the Board, a petition may be withdrawn only with the consent of the Regional Director with whom such petition was filed. After the transfer of a case to the Board, the petition may be withdrawn only with the consent of the Board. Whenever the Regional Director or the Board, as the case may be, approves the withdrawal of any petition, the case is closed. Rules and Regulations, Section 102.60(a).

When the petitioner moves to withdraw its petition, but the intervenor opposes, the petitioner may withdraw from the election. In a specific instance, this was done "with prejudice" to the petitioner's filing of a new petition for a period of 6 months from the date of the decision "unless good cause is shown why the Board should entertain a new petition filed prior to the expiration of such period." *Carpenter Baking Co*., 112 NLRB 288, 289 (1955). See also *Baltimore Gas & Electric,* 330 NLRB 3 (1999), where a Board majority permitted withdrawal after a second election. The withdrawal request came more than 12 months after the second election and at the time of the request, the Board was considering challenges and objections arising from that second election. And in *Mercy General Hospital*, 336 NLRB No. 109 (2001), the Board approved withdrawal of RC petitions on a showing that the petitioner and employer agreed to voluntary recognition. The settlement also involved a vacation order of an earlier Board decision.

Withdrawal from an election is permitted when, for example, the employees in two previous separate units represented by different unions are thereafter included in a combined unit. *Westinghouse Electric Corp*., 144 NLRB 455 (1963). In that case, although neither union claimed to represent all the employees in the combined unit, the employer's petition for such a unit was granted, and in these circumstances either or both unions were permitted to withdraw from the election within 10 days from the date of the Board's decision with the proviso that, if both unions withdrew from the election, the employer's petition would be dismissed. However, if both unions elected to withdraw, and the employer's petition was dismissed, that petition could be reinstated if either or both unions made any claim to represent the employees in question within 6 months of the date of dismissal. Id. at 459. See also *Denver Publishing Co*., 238 NLRB 207 (1978).

In *Transportation Maintenance Service*, 328 NLRB 691 (1999), a divided Board permitted the employee petitioner in an RD case to withdraw the petition after the election but before the count of the impounded ballots.

8-300 Effect of Disclaimer or Withdrawal

Board policies and procedures with respect to disclaimers and withdrawals including the effects thereof are set out in the Board's Representation Casehandling Manual. See sections 11110–11118 (withdrawals) and sections 11120–11124 (disclaimers). See also *NLRB v. Davenport Lutheran Home,* 330 NLRB No. 74 (2001) and *Baltimore Gas & Electric*, 330 NLRB 3 (1999).